

\$\$1\$\$

DISPUTES REVIEW BOARD

THREE PARTY AGREEMENT

THIS THREE PARTY AGREEMENT, hereinafter called "AGREEMENT", made and entered into this ____ day of _____, 19__, between the State of Washington, acting through the Washington State Department of Transportation, which is the Contracting Agency, and the Secretary of Transportation, hereinafter called the "STATE"; the _____, hereinafter called the "CONTRACTOR"; and the Disputes Review Board, hereinafter called the "BOARD", and consisting of three members: _____, _____, and _____,

WITNESSETH, that

and WHEREAS, the STATE is now engaged in the construction of *** \$\$\$\$ ***;

WHEREAS, the *** \$\$\$\$ *** contract provides for the establishment and operation of the BOARD to assist in resolving disputes and claims; and

WHEREAS, the BOARD is composed of three members, one selected by the STATE, one selected by the CONTRACTOR, and the third member selected by these two;

NOW THEREFORE, in consideration of the terms, conditions, covenants, and performance contained herein, or attached and incorporated and made a part hereof, the parties hereto agree as follows:

1

DESCRIPTION OF WORK

In order to assist in the resolution of disputes and claims between the CONTRACTOR and the STATE, the STATE has provided, in the *** \$\$\$\$ *** contract, for the establishment of the BOARD. The intent of the BOARD is to fairly and impartially consider disputes placed before it and provide written recommendations for resolution of these disputes to both the STATE and the CONTRACTOR. The members of this BOARD, shall perform the engineering services necessary to participate in the BOARD's actions as designated in Section II, Scope of Work.

II

SCOPE OF WORK

The Scope of Work of the BOARD includes, but is not limited to, the following items of work:

A. Third BOARD Member Selection

The first duty of the STATE and CONTRACTOR selected members of the BOARD is to select the third member. The third member shall not have had any previous financial or employment ties with either the CONTRACTOR or the STATE. The goal is to obtain a third BOARD member who will compliment the first two by furnishing a needed expertise which will facilitate the BOARD's operations. The first two BOARD members shall proceed with the selection of the third BOARD member upon receiving their notices to proceed. Should the first two members be unable to select a third member within 60 calendar days of the latest notice to proceed, either the STATE or the CONTRACTOR or both may appeal to the Thurston County Superior Court for selection of a third member by the court from a list or lists submitted to the court by the STATE and/or the CONTRACTOR.

B. Procedures

After selection of the third BOARD member and prior to consideration of an appeal, the BOARD shall establish rules that will govern the conduct of its business and reporting procedures based on the Guidelines, attached as an Appendix to this AGREEMENT. The BOARD recommendations, resulting from their consideration of a dispute or claim, shall be furnished in writing to the STATE and the CONTRACTOR. The recommendations shall be based on the pertinent contract provisions, and the facts and circumstances involved in the dispute.

C. Furnishing Documents

The STATE shall furnish to the BOARD three copies of the Contract and other documents which are or may become pertinent to the activities of the BOARD. The CONTRACTOR shall furnish to the BOARD three sets of documents which are or may become pertinent to the activities of the BOARD, except documents furnished by STATE. A party furnishing any written documentation to the BOARD must furnish copies of such information to the other party before the hearing begins.

D. Construction Site Visits

The BOARD members shall visit the project site to keep abreast of construction activities and to develop a familiarity of the work in progress. The frequency, exact time, and duration of these visits shall be as mutually agreed between the STATE, the CONTRACTOR, and the BOARD.

E. BOARD Consideration of Disputes or Claims

Upon receipt by the BOARD of a written appeal of a dispute, from either the CONTRACTOR or the STATE, the BOARD shall convene to review and consider the appeal. The time and location of BOARD meetings shall be determined by the STATE, the CONTRACTOR, and the BOARD. Both the STATE and CONTRACTOR shall be given the opportunity to present their

evidence at these meetings. It is expressly understood that the BOARD members are to act impartially and independently in the consideration of the contract provisions, and the facts and conditions surrounding any written appeal presented by the STATE or the CONTRACTOR, and that the recommendations concerning any such appeal are advisory.

Either the STATE or the CONTRACTOR may appeal a recommendation to the BOARD for reconsideration. However, reconsideration will only be allowed when there is new evidence to present.

F. BOARD Member Replacement

Should the need arise to appoint a replacement BOARD member, the replacement BOARD member shall be appointed in the same manner as the original BOARD members were appointed. The selection of replacement BOARD member shall begin promptly upon notification of the necessity for a replacement and shall be completed within 30 calendar days. The AGREEMENT will be supplemented to indicate change in BOARD membership.

III

CONTRACTOR RESPONSIBILITY

The CONTRACTOR shall furnish to each BOARD member, one copy of all pertinent documents which are or may become necessary for the BOARD to perform their function. Pertinent documents are any drawings or sketches, calculations, procedures, schedules, estimates, or other documents which are used in the performance of the work or in justifying or substantiating the CONTRACTOR's position. A copy of such pertinent documents must also be furnished to the STATE.

IV

STATE RESPONSIBILITIES

The STATE shall furnish the following services and items:

A. Contract Related Documents

The STATE shall furnish the BOARD three copies of the *** \$\$1\$\$ *** contract, change orders, written instructions issued by the STATE to the CONTRACTOR, or other documents pertinent to the performance of the contract and therefore, necessary for the BOARD to perform their function.

B. Coordination and Services

The STATE's Project Engineer for the *** \$\$1\$\$ *** project will, in cooperation with the CONTRACTOR, coordinate the operations of the BOARD. The STATE, through the Project Engineer, will arrange or provide conference facilities at or near the contract site and provide secretarial and copying services.

C. BOARD Cost Records

1 The STATE will maintain complete cost records for the STATE and
2 CONTRACTOR shared expenses of the BOARD and these records will be
3 available for inspection by the CONTRACTOR. These expenses include the
4 third member's wages and travel expense, local lodging and subsistence for
5 all BOARD members, and direct costs associated with BOARD operations.
6 Excluded from these records are the wages and travel expenses of the
7 STATE and CONTRACTOR selected members of the BOARD.
8

9 10 V

11 12 TIME FOR BEGINNING AND COMPLETION

13
14 The BOARD is to be in operation throughout the life of the *** \$1\$ ***
15 construction contract. To establish a firm completion date, *** \$2\$ *** is the date for
16 completion of all work of this AGREEMENT. Should the construction contract end
17 earlier, this AGREEMENT may be terminated under terms of Section VIII, Termination
18 of Agreement, elsewhere herein. Should the construction contract continue beyond
19 *** \$2\$ *** or the work anticipated for the BOARD by this AGREEMENT not be
20 completed by that date, a Supplemental Agreement will be negotiated and executed to
21 extend the completion date.
22

23 The BOARD members shall not begin any work under the terms of this
24 AGREEMENT until authorized in writing by the STATE.
25

26 27 VI

28 29 PAYMENT

30
31 The BOARD members shall be paid by the STATE and the CONTRACTOR
32 for services rendered under this AGREEMENT as provided hereinafter. Such
33 payments shall be full compensation for work performed or services rendered, and for
34 all labor, materials, supplies, equipment, and incidentals necessary to the operation of
35 the BOARD. The BOARD members shall comply with all applicable portions of 48
36 CFR 31.
37

38 A. All Inclusive Rate Payment

39 40 1. Fee - STATE and CONTRACTOR Appointed Members

41 Payment for services rendered as STATE and CONTRACTOR
42 members of the BOARD, will be at the respective rates agreed to
43 between the STATE and CONTRACTOR and their respective BOARD
44 members. Payment shall be made under separate agreement between
45 the respective parties and shall include travel expense from the BOARD
46 member's point-of-origin to the initial local point of arrival, such as, ***
47 \$3\$ ***.
48

49 2. Fee - Third Appointed Member

50 Payment for services rendered as a member of the BOARD shall be at
51 the daily billing rate of \$___ including travel time. This daily rate
52 includes all direct labor costs, overhead, and profit. Subsequent
53 changes in the billing rate must be authorized by a Supplemental
54 Agreement.
55

56 3. Direct Non-Salary Costs

1 Direct non-salary costs will be reimbursed at the actual cost to the
2 BOARD members, except for the non-local travel by the STATE and
3 CONTRACTOR appointed members, which is separately compensated.
4 Direct non-salary charges may include, but are not limited to; travel,
5 subsistence, lodging, printing, long distance telephone, supplies, etc.
6 Automobile mileage will be reimbursed at the rate in effect at the time
7 the trip is taken and shall be supported by the date and time of each trip
8 with origin and destination of such trips. The current rate is *** \$\$\$\$ ***
9 cents per mile which will remain in effect until changed in writing by the
10 STATE.

11
12 Subsistence and lodging expenses will be reimbursed at the same rate
13 as for STATE employees, which is the actual cost but not to exceed ***
14 \$\$\$\$ *** per day. The meetings will take place in *** \$\$\$\$ ***.

15
16 The billing for non-salary cost, directly identifiable with the project, shall
17 be an itemized listing of the charges supported by the original bills,
18 invoices, expense accounts, and miscellaneous supporting data retained
19 by the BOARD member.

20
21 Copies of the original supporting documents shall be supplied to the
22 STATE upon request.

23
24 4. Maximum Total Amount Payable

25 The maximum total amount payable under this AGREEMENT, for the
26 third member's fee and travel costs and the BOARD's direct nonsalary
27 costs shall not exceed ____ Dollars (\$____), unless a prior Supplemental
28 Agreement has been negotiated and executed by the STATE.

29
30 B. Payments

31 The BOARD members may submit invoices to the STATE for partial payment
32 for work completed not more often than once per month during the progress
33 of the work. Such invoices shall be in a format approved by the STATE and
34 accompanied by a general description of activities performed during that
35 billing period. The value of the work accomplished for partial payment shall
36 be established by the billing from the BOARD member, itemizing direct
37 payroll for the third BOARD member, and direct non-salary costs for all three
38 BOARD members.

39
40 C. Inspection of Costs Records

41 The BOARD members shall keep available for inspection by representatives
42 of the STATE and the United States, for a period of three years after final
43 payment, the cost records and accounts pertaining to this AGREEMENT. If
44 any litigation, claim, or audit arising out of, in connection with, or related to
45 this contract is initiated before the expiration of the three-year period, the cost
46 records and accounts shall be retained until such litigation, claim, or audit
47 involving the records is completed.

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50 **VII**

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52 **ASSIGNMENT OF TASKS OF WORK**

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54 The BOARD members shall not assign any of the work of this
55 AGREEMENT.
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VIII

TERMINATION OF AGREEMENT

The parties to this AGREEMENT mutually agree that this AGREEMENT may be terminated at any time upon not less than 30 calendar days written notice to the other parties. BOARD members may withdraw from the BOARD by providing such notice. BOARD members may be terminated for cause only by their original appointor, therefore, the STATE may only terminate the STATE appointed member, the CONTRACTOR may only terminate the CONTRACTOR appointed member, and the first two members must agree to terminate the third member.

IX

LEGAL RELATIONS

The parties hereto mutually understand and agree that the BOARD member in the performance of duties on the BOARD, is acting in the capacity of an independent agent and not as an employee of either the STATE or the CONTRACTOR.

No party to this AGREEMENT shall bear a greater responsibility for damages or personal injury than is normally provided by Federal and/or State of Washington Law.

The STATE and CONTRACTOR shall indemnify and hold harmless the BOARD members from and against all claims, damages, losses, and expenses, including but not limited to attorney's fees arising out of and resulting from the actions and recommendations of the BOARD.

X

DISPUTES

Any dispute between the parties hereto, arising out of the work or other terms of this AGREEMENT, which cannot be resolved by negotiation and mutual concurrence between the parties, shall be referred to the Superior Court of the State of Washington in Thurston County as provided in Section XI, Venue, Applicable Law, and Personal Jurisdiction.

XI

VENUE, APPLICABLE LAW, AND PERSONAL JURISDICTION

In the event that any party deems it necessary to institute legal action or proceedings to enforce any right or obligation under this AGREEMENT, the parties hereto agree that any such action shall be initiated in the Superior Court of the State of Washington, situated in Thurston County. The parties hereto agree that all questions shall be resolved by application of Washington law and that the parties to such action shall have the right of appeal from such decisions of the Superior Court in accordance with the laws of the State of Washington. The BOARD member hereby consents to the personal jurisdiction of the Superior Court of the State of Washington, situated in Thurston County.

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XII

FEDERAL REVIEW

The Federal Highway Administration shall have the right to review the work in progress.

XIII

CERTIFICATION OF THE BOARD MEMBERS AND THE STATE

Attached hereto as Exhibit "A" is the "CERTIFICATION OF THE CONTRACTOR/BOARD MEMBERS", the "CERTIFICATION OF STATE DEPARTMENT OF TRANSPORTATION", and the "CERTIFICATION OF BOARD MEMBERS".

IN WITNESS WHEREOF, the parties hereto have executed this AGREEMENT as of the day and year first above written.

BOARD MEMBER

BOARD MEMBER

By: _____

By: _____

Title: _____

Title: _____

BOARD MEMBER

By: _____

Title: _____

CONTRACTOR

WASHINGTON STATE DEPARTMENT
OF TRANSPORTATION

By: _____

By: _____

Title: _____

Title: _____

Approved as to Form Only this

____ day of _____, 19__

Assistant Attorney General

EXHIBIT A (Page 1)

CERTIFICATION OF CONTRACTOR/BOARD MEMBERS

The undersigned hereby certify that they represent the firm located at the indicated address and that neither the undersigned nor the firm represented has:

- (a) employed or retained for a commission, percentage, brokerage, contingent fee, or other consideration, any firm or person (other than a bona fide employee working solely for me or the firm indicated below) to solicit or secure this AGREEMENT; or
- (b) agreed, as an express or implied condition for obtaining this contract, to employ or retain the services of any firm or person in connection with carrying out this AGREEMENT; or
- (c) paid, or agreed to pay, to any firm, organization or person (other than a bona fide employee working solely for me or the firm indicated below) any fee, contribution, donation, or consideration of any kind for, or in connection with, procuring or carrying out this AGREEMENT; except as here expressly stated (if any):

I acknowledge that this certification is to be furnished to the State Department of Transportation and the Federal Highway Administration, U.S. Department of Transportation, in connection with this agreement involving participation of Federal-aid highway funds, and is subject to applicable State and Federal laws, both criminal and civil.

_____ Name	_____ Name
_____ Firm Represented	_____ Firm Represented
_____ Firm Address	_____ Firm Address
_____ Signature Date	_____ Signature Date
_____ Name	_____ Name
_____ Firm Represented	_____ Firm Represented
_____ Firm Address	_____ Firm Address
_____ Signature Date	_____ Signature Date

EXHIBIT A (Page 2)

CERTIFICATION OF STATE DEPARTMENT OF TRANSPORTATION

I hereby certify that I am the _____ of the Department of Transportation of the State of Washington, and that the above consulting firm or the representative of the consulting firm has not been required, directly or indirectly as an express or implied condition in connection with obtaining or carrying out this AGREEMENT to:

(a) employ or retain, or agree to employ or retain, any firm or person; or

(b) pay, or agree to pay, to any firm, person, or organization, any fee, contribution, donation, or consideration of any kind;

except as here expressly stated (if any):

I acknowledge that this certificate is to be furnished the Federal Highway Administration, U.S. Department of Transportation, in connection with this AGREEMENT involving participation of Federal-aid highway funds, and is subject to applicable State and Federal laws, both criminal and civil.

(Date)

(Signature)

CERTIFICATION OF BOARD MEMBERS

The undersigned hereby certify that they represent the firm located at the indicated address and that the undersigned and the firm represented, being duly sworn or under penalty of perjury under the laws of the United States, certify that, except as noted below, the firm, association or corporation or any person in a controlling capacity associated therewith or any position involving the administration of federal funds:

- (a) is not currently under suspension, debarment, voluntary exclusion, or determination of ineligibility by any federal agency;
- (b) has not been suspended, debarred, voluntarily excluded or determined ineligible by any federal agency within the past 3 years;
- (c) does not have a proposed debarment pending: and
- (d) has not been indicted, convicted, or had a civil judgment rendered against said person, firm, association or corporation by a court of competent jurisdiction in any matter involving fraud or official misconduct within the past 3 years.

(Insert Exceptions)

Exceptions will not necessarily result in denial of award, but will be considered in determining bidder responsibility. For any exception noted, indicate below to whom it applies, initiating agency, and dates of action. Providing false information may result in criminal prosecution or administrative sanctions.

I acknowledge that this certification is to be furnished to the State Department of Transportation and the Federal Highway Administration, U.S. Department of Transportation, in connection with this agreement involving participation of Federal-aid highway funds, and is subject to applicable State and Federal laws, both criminal and civil.

_____ Name	_____ Name
_____ Firm Represented	_____ Firm Represented
_____ Firm Address	_____ Firm Address
_____ Signature	_____ Signature
_____ Date	_____ Date
_____ Name	
_____ Firm Represented	
_____ Firm Address	
_____ Signature	
_____ Date	

DISPUTES REVIEW BOARD

GUIDELINES

OBJECTIVE

The principal objective of the BOARD is to assist in the resolution of disputes which would otherwise be likely submitted to litigation processes. If this objective is achieved, such disputes can be resolved promptly; with minimum expense, and with minimum disruption to the administration and performance of the work. It is not intended for the CONTRACTING AGENCY or the CONTRACTOR to default on their normal responsibility to amicably and fairly settle their differences by indiscriminately assigning them to the BOARD. It is intended that the mere existence of the BOARD will encourage the CONTRACTING AGENCY and the CONTRACTOR to resolve potential disputes without resorting to this appeal procedure. But when a dispute which is serious enough to warrant the BOARD's review does develop, the machinery for prompt and efficient action will already be in place.

RESPONSIBILITY OF THE BOARD

Render findings and recommendations on claims or disputes between the CONTRACTOR and the CONTRACTING AGENCY arising from the construction contract. Primarily, the BOARD will consider claims and disputes involving interpretation of the Plans and Specifications, delays, acceleration of the work, scheduling, classification of extra work, changed conditions, design changes, and the like. During its regular visits to the job site, the BOARD will encourage the settlement of differences at the job level.

The BOARD will refrain from officially giving any advice or consultative services to either party. The individual members will act in a completely independent manner and will have no consultative or business connections with either party.

During routine meetings of the BOARD as well as during formal hearings, BOARD members should refrain from expressing opinions on the merits of statements on matters under dispute or potential dispute. Opinions of BOARD members expressed in private sessions should be kept strictly confidential.

Normally, the BOARD member selected by the first two will act as Chairman for all activities, however, this post may be delegated to another member from time to time.

REGULAR CONSTRUCTION PROGRESS MEETINGS

All regular meetings will be held at or near the job site. The frequency of regular meetings will be set by the BOARD from time to time, consistent with the construction activities and the matters under consideration and dispute. Each meeting will consist of a round table discussion and a field inspection of the work being performed on that contract. The round table discussion will be conducted by a member of the CONTRACTING AGENCY's staff and will be attended by selected personnel from the CONTRACTING AGENCY and the CONTRACTOR. The agenda will generally be as follows:

- a. Meeting opened by the Chairman of the BOARD.
- b. Remarks by the CONTRACTING AGENCY's field representative.

- 1
2 c. A description by the CONTRACTOR's field representative of work
3 accomplished since the last meeting; the current status of the work,
4 schedule-wise; and a forecast for the coming period.
5
6 d. An outline by the CONTRACTOR's field representative of potential problems
7 and a description of proposed solutions.
8
9 e. An outline by the CONTRACTING AGENCY's Project Engineer of the status
10 of the work as the Project Engineer views it.
11
12 f. A brief description by the CONTRACTOR or CONTRACTING AGENCY of
13 potential claims or disputes which have surfaced since the last meeting.
14
15 g. A summary by the CONTRACTING AGENCY, the CONTRACTOR, or the
16 BOARD of the status of past disputes and claims.
17

18 The CONTRACTING AGENCY will prepare minutes of all regular meetings
19 and circulate them for revision and approval by all concerned.
20

21 The field inspection will cover all active segments of the work, the BOARD
22 being accompanied by both CONTRACTING AGENCY and CONTRACTOR
23 personnel.
24

25 **HANDLING OF WRITTEN APPEALS**

26 When a written appeal is referred to the BOARD, it shall, first, decide when
27 to conduct the hearings. The decision shall be tempered by the desires and needs of
28 the CONTRACTING AGENCY and the CONTRACTOR. If the matter is not urgent, it
29 may be scheduled for the time of the next regular visitation to the project. For an
30 urgent matter, the BOARD should meet at its earliest convenience.
31

32 The BOARD may also request that written documentation and arguments
33 from both parties be sent to each individual member for study before the hearing
34 begins. A party furnishing any written documentation to the BOARD must furnish
35 copies of such information to the other party before the hearing begins.
36

37 Normally, the hearings would be conducted at the job site. However, any
38 location which would be more convenient and still provide all required facilities and
39 access to necessary documentation would be satisfactory. Private sessions of the
40 BOARD may also be held at a location other than the job site.
41

42 For hearing on disputes, the third member or one of the other members
43 designated by the third member of the BOARD will act as Chairman. The
44 CONTRACTING AGENCY and the CONTRACTOR shall have a representative at all
45 hearings. The claimant will discuss the dispute followed by the other party. Each
46 party will then be allowed one or more rebuttals until all aspects are thoroughly
47 covered. Each time a person testifies, the BOARD members may ask questions, seek
48 clarification, or request further data. The BOARD may request from either party
49 documents or information that would assist the BOARD in making its findings and
50 recommendations including, but not limited to, documents used by the CONTRACTOR
51 in preparing the bid for this project. A refusal by a party to provide information
52 requested by the BOARD may be considered by the BOARD in making its findings and
53 recommendations. In large or complex cases, one or more additional hearings may be
54 necessary in order to consider all the evidence presented by both parties.
55

1 During open hearings, no BOARD member should express an opinion
2 concerning the merit of any facet of the case. By the same token, all BOARD
3 deliberations should be conducted in private, with all interim individual views kept
4 strictly confidential.

5
6 After the hearings are concluded, the BOARD shall meet in private and reach
7 a conclusion supported by two or more members. Its findings and recommendations,
8 together with its reasons shall then be submitted as a written report to both parties.
9 The recommendations shall be based on the pertinent contract provisions and facts
10 and circumstances involved in the dispute.

11
12 The BOARD should make every effort to reach a unanimous decision. If this
13 proves impossible, the dissenting member may prepare a minority report.

14
15 Although both parties should place weight upon the BOARD's
16 recommendations, they are not binding. Either party may appeal a recommendation to
17 the BOARD for reconsideration. However, reconsiderations should only be allowed
18 when there is new evidence to present. If the BOARD's recommendations do not
19 resolve the dispute, all records, and written recommendations, including any minority
20 reports, may be admissible as evidence in any subsequent litigation.

21
22 **MISCELLANEOUS**

23 It is not desirable to adopt hard and fast rules for the functioning of the
24 BOARD. The entire procedure should be kept flexible so that it can adapt to changing
25 situations. The BOARD should initiate, with the other parties' concurrence, new rules
26 or modifications to old ones whenever this is deemed necessary.